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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JOHNS-MANVILLE CORPORATION AND
JOHNS-MANVILLE SALES CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF GAF CORPORATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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GAF Corporation ("GAF"), like petitioners Johns-Manville Corporation and Johns-Manville Sales Corporation ("Manville"), is a plaintiff in one of eleven cases brought in the Claims Court which seek to establish the United States' responsibility for liabilities arising from the Government's use of asbestos.

Pursuant to Rule 36 of the Rules of this Court and with the consent of all parties, GAF respectfully files this brief *amicus curiae* in support of Manville's petition for a writ of certiorari. The petition seeks review of a decision by a divided panel of the Federal Circuit construing 28 U.S.C. § 1500 ("Section 1500") to require dismissal of Manville's Claims Court case because the contract claims asserted there were purportedly the "same" as tort claims previously filed by Manville against the United States in federal district court.

STATEMENT OF INTEREST OF AMICUS

GAF has a direct interest in the question on which review is sought for three reasons. First, the Government is now using the Federal Circuit's construction of Section 1500 in an effort to dismiss GAF's, as well as all other, Claims Court asbestos actions and thereby foreclose adjudication of the United States' contractual responsibilities to share the burden of compensating asbestos victims. Second, by vacating the Claims Court judgment for lack of subject matter jurisdiction, the Federal Circuit never reached the many substantive legal issues presented by a record developed in one of the longest trials in the history of the Claims Court. GAF and all other litigants were thus deprived of the guidance which would have been provided by appellate review of these legal issues. Third, GAF also lost the opportunity to benefit from certain findings made by the Claims Court in Manville's case which were favorable to GAF's action.

GAF, Manville and other manufacturers and distributors of asbestos-containing products are defendants in literally tens of thousands of suits claiming injuries due to exposure to asbestos. In large part, these claims are based on exposure to asbestos-containing products sold to the United States under the Government's mandatory contract specifications and with the Government's active encouragement. GAF, like Manville and other asbestos manufacturers, maintains that the United States now has a legal responsibility to share in the enormous actual and potential liabilities confronting these manufacturers.

Accordingly, GAF, Manville and other manufacturers have filed suits in the Claims Court seeking indemnification from the Government based on the breach of implied warranties arising from their contracts with the United States. 1/ Under the Tucker Act, such

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1/ *E.g.*, *GAF* v. *United States*, No. 287-83C (Cl. Ct. filed May 5, 1983); *Johns-Manville Corporation* v. *United States*, No. 465-83C (Cl. Ct. filed July 19, 1983); *Eagle-Picher Industries* v. *United States*, No. 170-83C (Cl. Ct. filed Mar. 25, 1983); *UNR Industries* v. *United States*, No. 16-84C (Cl. Ct. filed Jan. 16, 1984). The manufacturers main-

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claims may be brought only in the Claims Court, which has exclusive jurisdiction over contract claims against the United States in excess of $10,000. 28 U.S.C. §§ 1346(a)(2), 1491.

By agreement with the Government, the Claims Court actions brought by Manville and GAF were designed as test cases covering specified periods of time. 2/ Manville's case, to be tried first, involved claims arising during World War II. GAF's case, to be tried later, would involve claims arising during the period 1947 through 1959.

After years of preparation and a six-week trial, the Claims Court rendered a lengthy decision on Manville's claims, making extensive findings of fact and conclusions of law. *Johns-Manville* v. *United States*, 13 Cl. Ct. 72 (1987), *vacated*, 855 F.2d 1571 (Fed. Cir. 1988). Although the judgment was adverse to Manville, the trial court made certain findings favorable to GAF's case.

The Federal Circuit did not review the merits of Manville's appeal from the judgment. Instead, it held that the Claims Court lacked subject matter jurisdiction over Manville's Tucker Act claims by virtue of 28 U.S.C. § 1500, which bars a suit in the Claims Court if the plaintiff has the same claim pending against the United States in another court. The Federal Circuit concluded that a claim by Manville filed in a federal district court against the United States under the Federal Tort Claims Act was, for purposes of Section 1500, the same as the claims subsequently filed by Manville in the Claims Court. Hence, it affirmed the dismissal of Manville's case on jurisdictional grounds and vacated the Claims Court judgment.

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tain, *inter alia*, that the United States is liable to them by virtue of the implied warranty to indemnify for damages incurred by compliance with Government-mandated contract specifications. *See United States* v. *Spearin*, 248 U.S. 132 (1918).

2/ *Johns-Manville* v. *United States*, 13 Cl. Ct. 72, 77 (1987).

Immediately thereafter, the Government moved in the Claims Court to dismiss GAF's case and the other remaining asbestos actions, relying on the Federal Circuit's construction of Section 1500 in Manville's case. The Government maintains that, under that construction, various tort claims filed by GAF and the remaining plaintiffs against the Government in federal district courts are the "same" as the contract claims pending in the Claims Court. The Claims Court has suspended proceedings on the Government's motion with respect to all of the manufacturers' cases, pending disposition of Manville's petition for a writ of certiorari. 3/ Thus the Federal Circuit's construction of Section 1500 is now one of the issues confronting GAF in the Claims Court. 4/

Moreover, the Federal Circuit's construction of Section 1500 has deprived not only GAF and the parties to the Claims

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3/ *Keene Corporation* v. *United States*, Nos. 579-79C, 585-81C and related actions (Cl. Ct. Jan. 3, 1989).

4/ In dismissing Manville's case, the Federal Circuit relied entirely on a tort action filed by Manville *before* it filed its Claims Court action. Under *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), Section 1500 was held to require dismissal *only* where the "same" claim was filed in another court before the filing of the Claims Court action. The Federal Circuit expressly did not address the question of whether, in view of *Tecon*, Manville's after-filed tort actions would have required dismissal of the Claims Court case. Apdx. 4a n.3. ("Apdx." refers to the Appendix to the Manville petition for a writ of certiorari.)

The Government's motion against GAF relies entirely on a tort suit filed by GAF in federal district court one day after it filed its Claims Court action. Hence, GAF maintains not only that its tort and contract claims are not the "same," but that even if they were, *Tecon* prevents dismissal of its case.

In suspending proceedings with respect to GAF's case, the Claims Court stated that "since the Court is inclined at this point, before argument, to deny [the Government's] motion as to GAF, GAF is not prejudiced by waiting to determine the impact of an acceptance of the petition on the Federal Circuit's decision." *Keene Corporation* v. *United States*, Nos. 579-79C, 585-81C and related actions (Cl. Ct. Jan. 5, 1989) (order denying status conference). Because the Government, notwithstanding *Tecon*, urges dismissal of GAF's case relying on the construction placed on Section 1500 by the Federal Circuit, GAF continues to have a strong interest in the question on which the petition seeks review.

Court litigations, but also the tens of thousands of persons claiming injury from exposure to asbestos, of a full appellate review on the merits which may help resolve the question of the Government's legal responsibility to participate in the task of compensating such claimants.

The Federal Circuit's decision also has deprived GAF of the opportunity to benefit from the findings made by the Claims Court favorable to GAF's case — in particular, the finding that the United States knew of the hazards posed by asbestos to shipyard workers prior to the time that it encouraged GAF to develop, and contracted with GAF to supply it with, asbestos–containing products. *See Johns–Manville* v. *United States*, 13 Cl. Ct. 72, 136–45 (1987).

SUMMARY OF ARGUMENT

For the reasons specified in Manville's petition, GAF agrees that the Federal Circuit's construction of Section 1500 is erroneous. The Federal Circuit majority's construction of the word "claim" as it appears in Section 1500 is at odds with the use of that term in any other context. It treats as the same, tort claims arising out of the Government's negligence towards a Government shipyard worker employed in constructing and repairing Government ships and claims arising out of the Government's breach of contractual obligations to Government contractors. The Federal Circuit concludes not only that differences in legal theory, but also differences in "the elements of proof necessary to present a prima facie case" are "not relevant." Apdx. 17a. In the end, the Federal Circuit's construction of Section 1500 produces the startling conclusion that a tort claim for contribution for amounts paid to one claimant, John Robinson, for injuries he suffered because of exposure to asbestos in a Government shipyard between 1965 and 1980 is "the same" as a claim for contractual indemnification for amounts paid to hundreds of other claimants who suffered injuries because of exposure to asbestos during World War II.

Most significantly, the Federal Circuit treats as the "same" for purposes of Section 1500, contract claims which fall within the exclusive jurisdiction of the Claims Court and tort claims falling within the exclusive jurisdiction of the federal district courts. As a result, the

Federal Circuit's decision expands an anachronistic post-Civil War statute into a requirement — nowhere articulated by Congress — that litigants involved in a controversy with the United States must elect between their right to assert claims which can only be pursued in the Claims Court and their right to assert a wide variety of other claims which can only be enforced in federal district courts. This renders all the more troublesome the protean "operative facts" standard used by the Federal Circuit to define "claim," because it provides almost no guidance to future litigants who may be found after the fact to have unwittingly made that election.

GAF's principal purpose in submitting this amicus brief, however, is to bring to the Court's attention the importance of the major social, economic and legal problem which will be affected by the jurisdictional question on which review is sought: the legal responsibility of the United States to participate in compensating the hundreds of thousands of victims of asbestos-related diseases. The decision of the Federal Circuit majority is already being used by the Government in an attempt to foreclose all Claims Court adjudication of this issue of critical national importance.

GAF also submits that there is another compelling reason why review by this Court is especially appropriate here. The Federal Circuit's decision has an impact on federal court jurisdiction far beyond the Claims Court. In effect, this decision levies a heavy tax for admission to the federal district courts in order to assert rights which Congress placed within their exclusive jurisdiction. For by holding that the filing of such claims in federal district courts bars subsequent contract claims enforceable only in the Claims Court, the decision conditions access to federal district courts on the surrender of these contract rights. Yet — because Section 1500 is a statute defining Claims Court jurisdiction — none of these federal district courts or other Circuit Courts of Appeals will have any opportunity to give their views on this far-reaching curtailment of federal statutory rights and federal jurisdiction. This makes it all the more important that the Federal Circuit's expansive reading of Section 1500 not be left unreviewed.

ARGUMENT

I

THE FEDERAL CIRCUIT'S CONSTRUCTION OF SECTION 1500 MAY PREVENT A JUST RESOLUTION OF A CONTROVERSY OF GREAT SOCIAL, ECONOMIC AND LEGAL IMPORTANCE

It has been estimated that more than 21 million American workers have suffered significant exposure to asbestos in the last 40 years [5/] and that between 154,000 and 450,000 may die over the next 30 years as a result. [6/] At least 87,000 plaintiffs have brought claims in state and federal courts alleging personal injuries due to asbestos exposure. [7/] More than a billion dollars has already been spent in defending and settling asbestos personal injury actions. [8/]

As a result of these enormous liabilities, Manville and eight other manufacturers and distributors have declared bankruptcy. The amounts already paid are only a small part of the total amount which it is estimated will eventually be paid to plaintiffs to settle these actions. Rand Report at 10.

The Claims Court's findings in Manville's case, since vacated by the Federal Circuit's jurisdictional ruling, determined that the United States had knowledge of the health hazards of asbestos since at least 1938. *Johns-Manville* v. *United States*, 13 Cl. Ct. 72, 136–45 (1987). Nevertheless, beginning in World War II and continuing until as late as 1980, the Government called for asbestos in its contract specifications, sold raw asbestos to GAF and other manufacturers, actively participated in the development of asbestos products, and

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5/ J. Kakalik, P. Ebener, W. Felstiner & M. Shanley, *Costs of Asbestos Litigation* 9 (Rand Corporation No. R-3042-ICJ, 1983) (hereinafter "Rand Report").

6/ *Id.*

7/ M. Peterson & M. Selvin, *Resolution of Mass Torts: Toward a Framework for Evaluation of Aggregative Procedures* 5 (Rand Corporation No. N-2805-ICJ, 1988).

8/ *Id.* at 8-9.

then exposed shipyard employees to the hazards of asbestos by installing these products in U.S. Navy ships. A substantial portion of asbestos-related liabilities arise out of these activities of the United States.

The Federal Circuit's decision precludes a review on the merits of a judgment entered in the first trial designed to determine the United States' contractual obligations to participate in the compensation of asbestos-related injuries. The Government in fact relies on the Federal Circuit's decision as the basis for dismissing all of the remaining asbestos litigations pending in the Claims Court. The Federal Circuit's construction of Section 1500, therefore, may interfere with an adjudication on the merits of one of the nation's most pressing legal, economic and social issues.

Asbestos manufacturers have also sought to obtain contribution or indemnification from the Government in district court suits brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 ("FTCA"). Those suits seek to establish the Government's obligation to share in compensating for asbestos-related injuries based on the Government's negligence in the use of asbestos and in failing to enforce regulations and safety procedures designed to minimize the hazards of asbestos. But so far those efforts have been unsuccessful. The Government has succeeded in dismissing many of these cases on the ground that they are not cognizable under the FTCA for a variety of legal reasons. This Court has thus far declined to review any of these decisions foreclosing FTCA claims against the United States arising out of asbestos-related injuries. *See, e.g., Eagle-Picher Industries, Inc.* v. *United States*, 846 F.2d 888 (3d Cir.), *cert. denied*, 109 S. Ct. 490 (1988); *Gordon* v. *Lykes Bros. Steamship Co.*, 835 F.2d 96 (5th Cir.), *cert. denied*, 109 S. Ct. 73 (1988); *In re All Maine Asbestos Litigation (PNS)*, 772 F.2d 1023 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126 (1986). 9/

9/ In the only two FTCA cases that did go to trial, each court found that the Government was negligent and responsible for damages suffered by the plaintiff's decedent. However, both the Court of Appeals in *Shuman* v. *United States*, 765 F.2d 283 (1st Cir. 1985), and the trial court in *Dube* v. *Pittsburgh-Corning Corp.*, No. 83-0224, slip op. (continued)

As a result, the Claims Court has now assumed an even greater importance as a forum for adjudicating the Government's legal obligation to bear its fair share in the resolution of a crisis which it had a significant role in creating. The Federal Circuit should not be allowed to curtail access to the Claims Court as a forum for resolving this controversy without review by this Court.

II

A CONSTRUCTION OF SECTION 1500 WHICH BROADLY AFFECTS STATUTORY RIGHTS NOT WITHIN THE JURISDICTION OF THE CLAIMS COURT SHOULD NOT BE LEFT ENTIRELY TO THE FEDERAL CIRCUIT

Under the Federal Circuit's construction of Section 1500, before litigants avail themselves of federal statutory rights enforceable only in federal district courts they must decide whether by doing so they are giving up other rights enforceable only in the Claims Court. Section 1500, therefore, has been given an effect well beyond the Claims Court and the statutory rights enforceable there. Yet, except for the Federal Circuit, no appellate court other than this Court has the power to construe Section 1500.

Moreover, because the Federal Circuit is the only intermediate appellate court with the power to interpret Section 1500, this Court cannot defer review in the expectation of the development of a jurisprudence by the other Circuit Courts which may illuminate the meaning of this statute.

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(D. Me. June 9, 1988), *appeal docketed*, No. 88-1679 (1st Cir. Aug. 26, 1988), declined to impose liability on the United States because of the "discretionary function" exception to the Federal Tort Claims Act. Whether this doctrine was properly applied in light of this Court's recent decision in *Berkovitz* v. *United States*, 108 S. Ct. 1954 (1988), is the central issue on appeal in *Dube*, which was argued on December 6, 1988.

The Federal Circuit's decision is an especially appropriate opportunity for an authoritative construction of Section 1500 by this Court. The original version of this statute was enacted primarily to prevent litigants with claims for the seizure of their cotton during the Civil War from bringing suits against the United States in the Court of Claims after losing actions against government agents in federal district courts. Apdx. 9a-10a. The statute was needed because, under the law then prevailing, the earlier judgments were not *res judicata* in the later suits against the United States. Apdx. 49a. Although this problem has long since disappeared, the statute has been reenacted with minor changes in language but with no legislative explanation for its continued existence. Apdx. 11a. The Claims Court, in this very case, said that "[S]ection 1500 properly has been viewed as an anachronism." Apdx. 49a. It also has observed that "there is much truth to [the] conclusion that section 1500 serves no useful purpose in today's legal environment." *Arizona Helicopters* v. *United States*, 4 Cl. Ct. 662, 665 (1984).

It is, therefore, all the more surprising that the Federal Circuit now has decided to give the statute such an expansive and uncertain interpretation. This is especially true inasmuch as the Federal Circuit's construction, which so severely curtails rights to sue the United States, runs counter to the trend of congressional enactments which have removed obstacles to suits against the Government. The Tucker Act and the Federal Tort Claims Act are the foremost examples of this trend. [10/] Yet the Federal Circuit reads into Section 1500 a severe restriction on the rights afforded by these broad waivers of sovereign immunity -- making sacrifice of rights under one statute a condition to the exercise of rights under the other.

10/ *See also* Pub. L. No. 81-55, §1, 63 Stat. 62 (1949) (increasing the limitations period for FTCA actions from one to two years); Pub. L. No. 83-559, 68 Stat. 589 (1954) (permitting suits in federal district courts for recovery of taxes in excess of $10,000); Pub. L. No. 88-519, 78 Stat. 699 (1964) (allowing Government employees to sue in federal district courts for back pay); Pub. L. No. 95-563, 92 Stat. 2383 (1978) (eliminating the requirement that contractors exhaust their administrative remedies before bringing suit against the Government).

The Federal Circuit's decision increases the risk that litigants choosing to invoke statutory rights enforceable only in the federal district courts will thereby unwittingly forfeit other claims they may later wish to assert in the Claims Court. The "operative facts" standard adopted by the Federal Circuit furnishes them with little guidance as to whether their two actions later will be deemed the "same" under Section 1500. The "operative facts" concept is not derived from any established precedent or objective standard; as this case shows, what is an "operative fact" is in the eye of the beholder. The majority chooses ten items which it arbitrarily designates "operative facts" claimed to be common to Manville's FTCA and Claims Court actions. Apdx. 15a. Yet the dissent convincingly demonstrates that the "operative facts" in Manville's two actions — the facts necessary to prove its contract claims as distinct from its tort claims — are plainly not the same. Apdx. 29a.

In the end, the Federal Circuit's decision amounts to little more than the proposition that if otherwise different claims — involving different facts, different elements of proof, and rights under different federal statutes which cannot be enforced in the same court — arise out of controversies with the United States which share some common elements, they are the "same" claim for purposes of Section 1500. Whether Section 1500 should be given such a novel construction with such a significant impact on federal rights should not be left entirely to the Federal Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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